Blank Page

FILE COPY

No. 5, Original

In the Supreme Court of the United States

OCTOBER TERM, 1936

THE STATE OF NEBRASKA, COMPLAINANT

v.

THE STATE OF WYOMING, DEFENDANT

and

THE STATE OF COLORADO, IMPLEADED DEFENDANT

THE UNITED STATES OF AMERICA, INTERVENER

ANSWER OF DEFENDANT STATE OF WYOMING TO PETITION OF INTERVENTION OF THE UNITED STATES OF AMERICA

Blank Page

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 8, Original

THE STATE OF NEBRASKA, COMPLAINANT

v.

THE STATE OF WYOMING, DEFENDANT

and

THE STATE OF COLORADO, IMPLEADED DEFENDANT

THE UNITED STATES OF AMERICA, INTERVENER

ANSWER OF DEFENDANT STATE OF WYOMING TO PETITION OF INTERVENTION OF THE UNITED STATES OF AMERICA

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now defendant State of Wyoming and answering the first cause of action of the petition of intervention of the United States of America says:

FIRST

Answering the first paragraph of said first cause of action, this defendant admits that the North Platte River is a non-navigable stream; admits and alleges that it rises in Colorado and Wyoming and that it flows through the states of Colorado, Wyoming and Nebraska.

SECOND

Answering the second paragraph of said first cause of action, this defendant admits that the territory included within the basin of the North Platte River in Colorado, Wyoming and Nebraska was ceded to the United States by France, Spain and Mexico under treaties with United States in 1803, 1819 and 1848 respectively, and under an agreement entered into between Texas and the United States in 1850.

THIRD

Answering the third paragraph of said first cause of action, this defendant admits that by the said cessions the United States became the owner of all lands and all rights in waters within the ceded territory with the exception of lands and water rights which were privately owned at the times of such cessions; and for lack of information sufficient to form a belief denies that at the time of such cessions there were either no or very few and limited private rights in the waters of the North Platte River.

FOURTH

Answering the fourth paragraph of said first cause of action, this defendant denies that the rights of the United States in the waters of the North Platte River did not pass to Nebraska, Wyoming and Colorado upon their creation and admission to the Union and denies that said rights remained in the United States.

Further answering the said fourth paragraph, this defendant says that in 1889 the people of Wyoming adopted a Constitution containing, in Section 1 of Article VIII thereof, the provision that "the waters

of all natural streams, springs, lakes or other collections of still water within the boundaries of the state are hereby declared to be the property of the state." And thereafter and on July 10, 1890 the Congress of the United States passed an Act (26 Stat. 222) admitting the State of Wyoming into the Union on an equal footing with the original states in all respects whatever and providing "that the Constitution which the people of Wyoming have formed for themselves be and the same is hereby accepted, ratified and confirmed." And this defendant says that if the United States had not, prior to the adoption of the Wyoming Constitution and passage of the Act of Admission aforesaid, dedicated the waters of the non-navigable streams, including the North Platte River, and of the springs and lakes and other collections of still water to the public, disposed of the same and made the same publici juris, the aforesaid provision of the Constitution of Wyoming and the aforesaid provision of the Act of Admission constituted and constitute a compact between the United States and the State of Wyoming by which the waters of the non-navigable streams, including the North Platte River, springs, lakes and other collections of still water within the boundaries of the State of Wyoming, became and ever since have been the property of the said state or the people thereof, and the United States thereby, if it had not already done so, alienated and disposed of such waters and has not now and has not at any time since the adoption of said Constitution and passage of the Act of Admission had any right in, title to or ownership of said waters or any thereof.

FIFTH

Answering the fifth paragraph of intervener's first cause of action, this defendant denies that the United States has never, by Act of Congress or otherwise, abdicated or ceded away its rights in the waters of the North Platte River; avers that the United States, by the Acts of July 26, 1866 (14 Stat. 253), July 9, 1870 (16 Stat. 218) and March 3, 1877 (19 Stat. 377) and prior thereto permitted and authorized the acquisition of rights in the waters of the streams on the public domain, including the North Platte River, by private persons and corporations by compliance by them with local customs, state and territorial laws and court decisions prescribing the manner in which such rights could be acquired; admits and alleges that from time to time private persons have by appropriations made in compliance with local customs and territorial and state laws and court decisions acquired rights to the use of certain quantities of the waters of the North Platte River; denies that such rights have been acquired from the United States, denies that the United States has reserved, and denies that it had the right, power or authority to reserve, waters of the said River for Federal reclamation projects; denies that such waters or any part thereof have been reserved or withdrawn from future appropriation by the United States for said projects; and avers that the use for beneficial purposes of all waters of the North Platte River in the State of Wyoming not heretofore appropriated under the laws of said state is open to acquisition by qualified appropriators by compliance with the laws of said state with reference thereto and not otherwise.

Further answering the fifth paragraph of intervener's first cause of action, this defendant says that by the aforesaid Acts of July 26, 1866, July 9, 1870 and March 3, 1877, if it had not already done so, the United States alienated and disposed of the waters of the non-navigable streams in the arid regions, including the area now within the boundaries of the State of Wyoming, dedicated the same to the public and made the same publici juris, subject as to the use thereof for beneficial purposes to acquisition by appropriating the same in compliance with local customs and territorial and state laws and the territorial and state court decisions; and this defendant avers that since the said Acts and for a long time prior thereto the United States has not been the owner of or had any right in, title to or ownership of said waters or any thereof.

SIXTH

Answering the sixth paragraph of intervener's first cause of action, this defendant admits that the United States, by authority of the Reclamation Act of June 17, 1902 (32 Stat. 388), acting through the Secretary of the Interior, has constructed a reclamation project in the North Platte River basin known as the North Platte Project, embracing about 251,000 acres of land, of which approximately 182,000 acres are in Nebraska and approximately 69,000 acres in Wyoming; that the irrigation works of said project include the Pathfinder Reservoir in Wyoming, with a storage capacity of 1,070,000 acre feet, the Guernsey Reservoir in Wyoming, with a storage capacity of 70,000 acre feet, a diversion dam at Whalen, Wyoming, an exten-

sive system of main and lateral canals in Wyoming, including interstate canals, and two inland reservoirs in Nebraska known as Lake Alice and Lake Minatare, with a combined storage capacity of about 77,000 acre feet; and that in the construction and development of the said project the United States has expended approximately $22,000,000.00, substantially all of which is to be repaid as provided in the said Reclamation Laws, but that approximately $17,000,000.00 of it has not yet been repaid. This defendant admits that a large amount of the aforesaid approximate 182,000 acres of land lying within the State of Nebraska has been and is irrigated by water diverted by the United States from the North Platte River in Wyoming and conveyed across the state line into Nebraska, the amount of which land so irrigated in Nebraska is to this defendant unknown.

SEVENTH

Answering the seventh paragraph of intervener's first cause of action, this defendant denies that the United States reserved or withdrew or affected any reservation of any waters of the North Platte River for the purposes of the North Platte Project or otherwise. With reference to such alleged reservation and withdrawal, this defendant avers that the United States, through the Secretary of the Interior, pursuant to Section 8 of the Reclamation Act of 1902, made applications to the State Engineer of the State of Wyoming on December 6, 1904 for permission to store, divert and use the waters of the river upon the lands to be irrigated under the North Platte Project; and this defendant admits in so doing the United

States proceeded substantially in conformity with the laws of the State of Wyoming. This defendant denies that in the case of waters to be diverted or stored in Wyoming for use in Nebraska the United States proceeded in conformity with the laws of Wyoming. As to whether the United States or the Secretary of the Interior proceeded in conformity with the laws of the State of Nebraska this defendant for lack of knowledge sufficient to form a belief denies that the laws of that state were complied with by the United States.

EIGHTH

Answering the eighth paragraph of intervener's first cause of action, this defendant denies that any of the waters of the North Platte River were or could be reserved by the United States for the North Platte Project or for any other project. It admits that some of the waters appropriated, as aforesaid, by the United States through the Secretary of the Interior for the North Platte Project are used for the irrigation of lands included in the project; that such waters are applied directly to irrigation through the main and lateral canals of the project or are stored in reservoirs constituting a part of such project for withdrawal as needed; that of the approximate 251,000 acres of land included in the project about 151,000 acres were, at the time the project was commenced, public lands and were thereafter disposed of by the United States to settlers as provided by the Reclamation Act, and that the settlers, on the payment of certain charges, acquired rights to the use of said waters upon the lands to which such waters were applied. This defendant admits that the approxi-

mate 100,000 acres remaining were, at the time the project was commenced, privately owned, and that the United States entered into contracts with the owners of such lands whereby the United States agreed to store water and conduct the same to such lands and the owners of such lands agreed to pay certain charges for such service. And this defendant denies that the United States agreed to furnish any water to any lands except in the sense that it agreed to store water and conduct the same through its diversion works thereto. This defendant denies that the United States is furnishing waters to settlers and land owners; admits that it is storing water and conducting the same to lands within the project settled upon by land owners; admits that the said land owners are paying the charges for such service, that the charges have not been paid in full, and that in many cases final payments are not due for many years; and avers that the rights to the use of such waters under the laws of the States of Nebraska and Wyoming attach and are appurtenant to the particular lands upon which such waters are beneficially applied and that the only rights which the United States has in connection with said project are the ownership of the Pathfinder and Guernsey Dams, and appurtenant properties and the diversion works through which said waters are conducted to the lands irrigated and the right to be reimbursed for the cost thereof.

NINTH

Answering the ninth paragraph of intervener's first cause of action, this defendant denies that waters have been reserved by the United States for the North

Platte Project; admits that some of the waters acquired by the United States acting through the Secretary of the Interior by application to the State Engineer of the State of Wyoming and further proceedings in conformity to the laws of said state, as aforesaid, are used for hydro-electric developments at Lingle and Guernsey, Wyoming, where hydro-electric plants are operated in connection with and as a part of the said project; and admits that the waters so used are withdrawn from the direct flow of the North Platte River and the Laramie River, its tributary, and from storage in Guernsey Reservoir.

TENTH

Answering the tenth paragraph of intervener's first cause of action, this defendant denies that any of the waters of the North Platte River have been, are or can be reserved by the United States for the North Platte Project; admits that waters appropriated for said project by the United States, through the Secretary of the Interior, by application to the State Engineer of the State of Wyoming and further proceedings in compliance with the laws of the State of Wyoming, as aforesaid, are conducted to certain irrigation districts under the provisions of contracts entered into between the United States and said districts under authority of the Act of February 21, 1911 (36 Stat. 925), known as The Warren Act; denies that the owners of the land irrigated by such waters possessed or possess any water rights acquired through the United States or any water rights other than such as they may have acquired through compliance with state law and have not heretofore lost; and admits

that the United States agreed to furnish to said districts under the provisions of The Warren Act certain quantities of water in said contracts stipulated, that the districts in return agreed to pay therefor certain stipulated charges, that the United States is supplying waters to said districts under said contracts, and that the districts are paying certain charges therefor, and denies that approximately $362,000.00 of those charges have not yet been paid. This defendant denies that the annual delivery under said contracts is about 340,000 acre feet; admits that part of the waters annually delivered are project waters, that part of such project waters are storage from Pathfinder Reservoir and part thereof are seepage and return flow waters from the lands of the North Platte Project; and this defendant avers that as to how much of said delivered waters are project waters and as to how much of said project waters are Pathfinder storage and how much are return flow and seepage waters this defendant is without knowledge.

ELEVENTH

Answering the eleventh paragraph of intervener's first cause of action, this defendant denies that any waters of the North Platte River have been, are or could be reserved by the United States, and admits that some of the waters appropriated by the United States through the Secretary of the Interior by compliance with state law, as aforesaid, are delivered to municipal and industrial concerns in the vicinity of the North Platte Project with which the Secretary of the Interior has entered into contracts; denies that said contracts provide for the sale, and admits

that they provide for the delivery, of certain quantities of water; and avers that as to whether said contracts are permanent or temporary or both this defendant is without knowledge.

TWELFTH

Answering the twelfth paragraph of intervener's first cause of action, this defendant admits that the United States, by authority of the Reclamation Act, acting through the Secretary of the Interior, has undertaken and has under construction a reclamation project in the basin of the North Platte River known as the Kendrick Project and avers that the Kendrick Project is a unit of the North Platte reclamation development; admits that said project embraces about 66,000 acres of land, all within the State of Wyoming; that it includes the Seminoe Dam and Reservoir, with a storage capacity of 909,000 acre feet, the Alcova Dam and Reservoir, with a storage capacity of 165,000 acre feet, and main and lateral canals; that the total construction cost of the irrigation works of said project will be approximately $20,000,000.00, of which approximately $9,000,000.00 has already been expended by the United States, and that the project will include a hydro-electric development, costing approximately $5,000,000.00, now under construction at Seminoe Dam. This answering defendant denies that the United States expects to recoup by the disposal of water and electric energy all its expenditures upon the Kendrick Project; alleges that the United States will not, cannot, and has no authority or power to, dispose of water, that the rights to the use and only to the use of waters to be applied by irrigation

to lands in the Kendrick Project will, upon such application, attach to and become appurtenant to the lands irrigated and will belong to the owners of such lands, and that the rights of the United States will be confined to ownership of the diversion works and to the collection of stipulated amounts of money to be received for the service of conducting water to said lands; and this defendant admits that the United States expects by the disposal of electric energy and the sale of its service in conducting such waters to the lands to be irrigated, as aforesaid, to recoup all its expenditures to be made upon the Kendrick Project, and admits that none of such expenditures have as yet been recouped.

THIRTEENTH

Answering the thirteenth paragraph of intervener's first cause of action, this defendant denies that the United States reserved or withdrew from future appropriation, or that it effected reservations of certain or any quantities of the theretofore unappropriated waters of the North Platte River; and with reference to waters to be used for the purposes of the Kendrick Project, this answering defendant avers that the United States through the Secretary of the Interior applied to the State Engineer of the State of Wyoming, in compliance with and under the provisions of the laws of said state with reference to the acquisition of the right to use the waters of the non-navigable streams therein, for permission to appropriate and store such waters for the purposes of the Kendrick Project and to use some of said waters for the development of electric energy and to divert cer-

tain quantities thereof to be used for irrigation of the lands under the said project, and by compliance with the laws of said state and not otherwise acquired the right so to do. And this answering defendant admits that throughout said procedure culminating in the acquisition of such right the United States through the Secretary of the Interior proceeded under the Reclamation Act, and particularly Section 8 thereof, and that its procedure conformed with the laws of the State of Wyoming as to the acquisition by appropriation of rights to the use of water.

FOURTEENTH

Answering the fourteenth paragraph of intervener's first cause of action, this defendant denies that the waters of the North Platte River or any thereof were, are or could be reserved by the United States for the Kendrick Project or any other project; admits that some of the waters appropriated by the United States for said project, as aforesaid, will be used for the irrigation of lands included in the project, that some will be used to augment and regulate the flow of the said river, and that some will be used for the development of electric energy.

WHEREFORE, defendant State of Wyoming prays that the prayer of the United States that it be decreed to be the owner of the waters of the North Platte River alleged in its first cause of action to have been reserved by it be denied; that the prayer of the United States that it be decreed to be the owner of any unappropriated waters of the North Platte River be denied; that the prayer of the United States for other

relief be denied; that the owners of the lands irrigated by the use of water appropriated by the United States under the North Platte Project and the owners of the lands to be irrigated by the use of water appropriated by the United States under the Kendrick Project be decreed to be the owners of the water rights under such appropriations made by the United States; that the State of Wyoming or the people thereof be decreed to be the owner of any unappropriated waters, if any there be, of the North Platte River; and that the defendant State of Wyoming have such other and further relief in the premises as shall be found agreeable to equity and good conscience.

For its answer to the second and separate cause of action set out in the petition of intervention of the United States this answering defendant says:

FIRST

Answering the first paragraph of said second cause of action repeating and realleging as a part thereof all the allegations contained in the sixth paragraph of the first cause of action, this defendant repeats and realleges all the allegations contained in the sixth paragraph of its answer to intervener's first cause of action.

SECOND

Answering the second paragraph of said second cause of action, this defendant admits that for the purposes of the North Platte Project, as set out in said second cause of action, the United States acquired rights to the use of certain quantities of the theretofore unappropriated waters of the North Platte River,

that such rights were acquired by compliance on the part of the United States through the Secretary of the Interior with the laws of the State of Wyoming, in which state said waters were diverted, as to the acquisition by appropriation of rights to the use of water; and denies that in the case of waters diverted or stored in Wyoming for use in Nebraska the United States complied with the laws of Wyoming. As to whether the United States in the case of waters diverted or stored in Wyoming for use in Nebraska complied with the laws of Nebraska, defendant for lack of knowledge sufficient to form a belief denies that the United States complied with the laws of Nebraska.

THIRD

Answering the third paragraph of intervener's second cause of action, this defendant admits that some of the waters appropriated by the United States through the Secretary of the Interior for the North Platte Project are used for the irrigation of lands included in the project; that such waters are applied directly to irrigation through the main and lateral canals of the project or are stored in reservoirs constituting a part of such project for withdrawal as needed; that of the approximate 251,000 acres of land included in the project about 151,000 acres were, at the time the project was commenced, public lands and were thereafter disposed of by the United States to settlers as provided by the Reclamation Act, and that the settlers, on the payment of certain charges, acquired rights to the use of said waters upon the lands to which such waters were applied. This defendant admits that the approximate 100,000 remain-

ing acres were, at the time the project was commenced, privately owned, and that the United States entered into contracts with the owners of such lands whereby the United States agreed to store water and conduct the same to such lands and the owners of such lands agreed to pay certain charges for such service. And this defendant denies that the United States agreed to furnish any water to any lands except in the sense that it agreed to store water and conduct the same through its diversion works thereto. This defendant denies that the United States is furnishing waters to settlers and land owners; admits that it is storing water and conducting the same to lands within the project settled upon by land owners; admits that the said land owners are paying the charges for such service, that the charges have not been paid in full, and that in many cases final payments are not due for many years; and avers that the rights to the use of such waters under the laws of the States of Nebraska and Wyoming attach and are appurtenant to the particular lands upon which such waters are beneficially applied and that the only rights which the United States has in connection with said project are the ownership of the Pathfinder and Guernsey Dams and the diversion works through which said waters are conducted to the lands irrigated and the right to be reimbursed for the cost thereof.

FOURTH

Answering the fourth paragraph of intervener's second cause of action, this defendant admits that some of the waters appropriated by the United States for the North Platte Project are used for hydro-

electric developments at Lingle and Guernsey, Wyoming which are operated in connection with and as a part of the said project, and admits that the waters so used are withdrawn from the direct flow of the North Platte River and its tributary, the Laramie River, and from storage in the Guernsey Reservoir.

FIFTH

Answering the fifth paragraph of intervener's second cause of action, this defendant admits that some of the waters appropriated by the United States for the North Platte Project are conducted to certain irrigation districts under the provisions of contracts entered into between the United States and said districts, under authority of the Act of February 21, 1911 (36 Stat. 925), known as The Warren Act; denies that the owners of the land irrigated by such waters possessed or possess any water rights acquired through the United States or any water rights other than such as they may have acquired through compliance with state law and have not been heretofore lost; and admits that the United States agreed to furnish to such districts under the provisions of The Warren Act certain quantities of water in said contracts stipulated, that the districts in return agreed to pay therefor certain stipulated charges, that the United States is supplying waters to said districts under said contracts, and that the districts are paying certain charges therefor, and denies that approximately $362,000.00 of those charges have not yet been paid. This defendant denies that the annual delivery under said contracts is about 340,000 acre feet; admits that part of the waters annually delivered are

project waters and that some of such project waters are storage waters from Pathfinder Reservoir and some are seepage and return flow waters from the lands of the North Platte Project; and this defendant avers that as to how much of the water delivered to the district is project water and as to how much of such project water is Pathfinder storage and how much thereof is seepage and return flow from the North Platte Project this defendant is without knowledge.

SIXTH

Answering the sixth paragraph of intervener's second cause of action, this defendant admits that some of the waters appropriated by the United States are delivered to municipal and industrial concerns in the vicinity of the North Platte Project with which the Secretary of the Interior has entered into contracts; denies that said contracts provide for the sale, and avers that said contracts provide for the delivery of water, and avers that as to whether said contracts are permanent or temporary or both this defendant is without knowledge; and this defendant admits that said contracts provide for the use of waters appropriated for the North Platte Project by such municipal and industrial concerns.

SEVENTH

Answering the seventh paragraph of intervener's second cause of action repeating and realleging all the allegations contained in the twelfth paragraph of its first cause of action, this defendant repeats and realleges as a part of this answer all the allegations

contained in the twelfth paragraph of its answer to intervener's first cause of action.

EIGHTH

Answering the eighth paragraph of intervener's second cause of action, this defendant admits that for the purposes of the Kendrick Project the United States initiated the acquisition of rights to the use of certain quantities of the theretofore unappropriated waters of the North Platte River by complying with the laws of Wyoming as to the acquisition by appropriation of rights to the use of such waters, and that the United States will hereafter perfect those rights by further compliance with such law.

NINTH

Answering the ninth paragraph of intervener's second cause of action, this defendant admits that some of the waters appropriated by the United States for the Kendrick Project will be used for the irrigation of the lands included in said project, that some will be used to augment and regulate the flow of the North Platte River, and that some will be used for the development of electric energy.

WHEREFORE, defendant State of Wyoming prays that the prayer of the United States that it be decreed to be the owner of the rights to the use of the waters of the North Platte River which it alleges in its second cause of action it acquired be denied; that the prayer of the United States for other and further relief be denied; that the owners of the lands upon which the water appropriated by the United States for the North Platte Project is applied be decreed to be the owners of the water rights acquired by the United

States by its appropriations; that the owners of the lands to be irrigated by the use of water appropriated by the United States for the Kendrick Project be decreed to be the owners of the water rights acquired by the United States by such appropriations; and that the State of Wyoming have such other and further relief in the premises as shall be found agreeable to equity and good conscience.

Respectfully submitted,

RAY E. LEE,
Attorney General of Wyoming.

ROBERT R. ROSE,

JAMES A. GREENWOOD,
Solicitors for Defendant
State of Wyoming.

THOS. F. SHEA,
Deputy Attorney General,

WILLIAM C. SNOW,
Assistant Attorney General,
Of Counsel.

THE STATE OF WYOMING)
) ss.
COUNTY OF LARAMIE)

RAY E. LEE, being first duly sworn, upon his oath, according to law, deposes and says:

That he is the duly appointed, qualified and acting Attorney General of the State of Wyoming; that as such Attorney General he is the duly authorized solicitor and representative of the defendant State of Wyoming; that he has read the foregoing Answer of Defendant State of Wyoming to Petition of Intervention of the United States of America and knows the contents thereof, and that the facts therein alleged are true except such facts as are alleged upon information and belief and that as to those facts said affiant verily believes the same to be true.

RAY E. LEE.

Subscribed in my presence and sworn to before me this 13th day of July, 1938.

ELVERA L. SHULL,
Notary Public.

(Seal)

My commission expires November 24, 1938.